

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Real Estate Salesperson License Application of S.A.M.	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION
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This matter came on for hearing before Administrative Law Judge Raymond R. Krause (the ALJ) on October 24, 2006 at 9:00 a.m. in Hearing Room 13 of the Office of Administrative Hearings, 100 Washington Avenue, Suite 1700, Minneapolis, Minnesota. The record closed the same day.

Christopher M. Kaisershot, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101 appeared on behalf of the Department of Commerce (the Department). Robert G. Malone, Esq., 101 E. Fifth Street, Suite 800, St. Paul, Minnesota 55101, appeared on behalf of S.A.M. (the Respondent).

STATEMENT OF THE ISSUES

1. Whether Respondent should be denied a real estate sales person license because his conviction in 1993 of criminal sexual conduct in the third degree and the conduct underlying that conviction demonstrates that he is untrustworthy, financially irresponsible, or incompetent or unqualified to act as a real estate sales person.

2. Whether evidence of Respondent's subsequent rehabilitation should be considered under Minn. Stat. Chap. 364.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On May 3, 2006, Respondent submitted an application for licensure as a real estate sales person.¹

2. On the application, Respondent truthfully disclosed that he had a criminal history. Respondent's description of the criminal activity was that he, at the age of 32, "became involved with a 15 yr. old female. There was sexual contact."²

3. The Criminal Complaint in the underlying matter states that on July 31, 1993, the Respondent drove the minor home after she babysat his children that evening. The Complaint indicates that Respondent engaged in sexual intercourse with the minor despite her efforts to resist.³

4. On August 3, 1993, Respondent was charged with three felonies: First Degree Criminal Sexual Conduct, and two counts of Third Degree Criminal Sexual Conduct.⁴

5. On December 6, 1993, Respondent pled guilty to Counts 1 and 2, while Count 3 was dismissed as part of a plea bargain. Respondent received a Stay of Imposition for 15 years on Count 2. As part of the sentence, Respondent was ordered to comply with several conditions including: one year in jail, restitution, fines and fees, successful completion of a sex offender treatment program, completion of a neuropsychiatric evaluation, no contact with the victim or her family, remain law abiding, and have no unsupervised contact with minor female children.⁵

6. With respect to Count 1, Respondent was given a Stay of Adjudication for 15 years subject to the same conditions as Count 2.⁶

7. Based upon the recommendations of Respondent's probation officer and the Minnesota Department of Corrections, the District Court for the Tenth Judicial District, on May 31, 2001, ordered that Respondent be discharged from probation on the Stay of Imposition for Count 2, be "restored to all civil rights and to full citizenship with full right to vote and hold office the same as if said conviction had not taken place." Furthermore, the offense was deemed to be a misdemeanor.⁷

8. With respect to Count 1, based again on the recommendation of the probation officer and the Department of Corrections, the District Court for the

¹ Exhibit. 1.

² Id.

³ Ex. 2a.

⁴ Id.

⁵ Ex. 2b and 2c.

⁶ Id.

⁷ Ex. F.

Tenth Judicial District, on May 31, 2001, ordered the proceedings against Respondent be dismissed and that Respondent be “discharged from probation without adjudication of guilt.” Furthermore, the Respondent “shall not be deemed to have been convicted, and he/she shall not incur any of the disqualifications or disabilities imposed by law for conviction of crime except those imposed by the Federal Gun Control Act.”⁸

9. Respondent has completed all other requirements for licensure as a real estate sales person.⁹ Respondent has a job offer from a licensed real estate broker.¹⁰

10. On January 13, 1994, Respondent voluntarily underwent a polygraphic examination.¹¹ The conclusion of the polygraphist was that the physical responses associated with the answers to the relevant questions put to the Respondent “are not those usually associated with deception”. The answers to the relevant questions indicate that the Respondent believed that the minor consented to the sexual contact and that there was no coercion.¹²

11. Respondent has been gainfully employed as a driver for [DATA REDACTED] from 1998 until 2006. He has been Secretary and was President of the [DATA REDACTED]Alcoholics Anonymous from [DATA REDACTED] until [DATA REDACTED]. He was also President of the [DATA REDACTED]Association from 2001 until 2005.¹³

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The ALJ and the Commissioner of Commerce (Commissioner) have jurisdiction to consider this matter.¹⁴

2. Respondent received due, proper and timely notice of the charges against him and of the time and place of the hearing. He timely requested a hearing on the matter. This matter is, therefore, properly before the Commissioner and the Administrative Law judge.

3. The burden of proof in this matter is on the Respondent to prove that a license should be granted.¹⁵

⁸ Ex. E.

⁹ Testimony of P. Stock, Tape 1.

¹⁰ Test. of W. Heinks, Tape 1.

¹¹ Ex. D.

¹² Id.

¹³ Test. of S.A.M., Tape 1.

¹⁴ Minn. Stat. §§ 45.027, subd. 7 and 14.50.

¹⁵ Minn. R. pt. 1400.7300, subp. 5.

4. The Commissioner may deny a license to an applicant who has demonstrated that the applicant is "untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the commissioner".¹⁶

5. Minn. Stat. § 364.03, subd.1, (the Rehabilitation Provision) prohibits disqualification from licensure based on a criminal conviction unless the crime relates directly to the licensed occupation.

6. Minn. Stat. § 45.027, subd.10 provides that the Rehabilitation Provision does not apply when the conduct underlying a conviction would be the basis for denying a license.

7. Respondent has demonstrated by a preponderance of the evidence that he is trustworthy, financially responsible, competent and qualified to hold a real estate sales person's license within the meaning of Minn. Stat. §45.027, subd. 7(a)(4).

8. A preponderance of the evidence demonstrates that the conduct underlying the Respondent's conviction is not a sufficient basis for denial of a real estate sales person's license.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that: The decision by the Commissioner to deny the application of Respondent for a real estate sales person license be REVERSED.

Dated: November 1, 2006

s/Raymond R. Krause

RAYMOND R. KRAUSE
Administrative Law Judge

Reported: Taped, 1 tape
No transcript prepared

¹⁶ Minn. Stat. § 45.027, subd.7(a)(4).

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Department of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Deputy Commissioner Kevin Murphy, 85 Seventh Place East, Suite 500, St. Paul, Minnesota 55101, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.63, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

MEMORANDUM

Background

In August of 1993, Respondent committed an act that was wrong and unjustifiable. He admits to having sexual intercourse with a minor, less than half his age. Whether or not the act of intercourse was consensual is irrelevant. Because of the age of the minor involved, it is illegal and the minor is incompetent to give her consent.

As a result of this conduct and the resulting criminal prosecution and conviction, the Department proposes to deny Respondent's application for a real estate person's license. Respondent argues that this one act, thirteen years in the past should not forever bar his ability to receive such a license, especially in view of his successful efforts to rehabilitate himself.

Licensing Criteria

Minn. Stat. § 45.027, subd. 7(a)(4) permits the Commissioner to deny a license to a person who has demonstrated that he or she is "untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the commissioner".

Evidence was introduced that the Respondent has completed all the training requirements and passed all the tests required to be licensed. Evidence established that he has a job awaiting him with a licensed broker who is aware of his criminal history and who has full confidence in his ability to competently and professionally carry out the responsibilities of a licensed real estate sales person. The Department does not dispute that the Respondent has met all the requirements of competency and qualification.

The Respondent has been Secretary and President of his local Alcoholics Anonymous and in that position has been responsible for the funds of the organization. He has also been President of the [DATA REDACTED] Association from 2001 to 2005 and in that capacity had responsibility for the funds of that organization. There have been no questions as to his fiduciary conduct with either organization. The Department offered no evidence of any reason to believe Respondent is financially irresponsible.

The only other criteria for denying the license is that of untrustworthiness. The Department argues that both the convictions of Respondent for criminal sexual conduct as well as the conduct underlying those convictions reflect a continuing stain of untrustworthiness. It is the Department's contention that the Respondent cannot be trusted to have unsupervised meetings with clients or potential clients nor can he be trusted to have access to the combinations of lock-boxes of homes that are for sale.

With regard to the convictions themselves, there can be no basis to deny the license on those grounds alone. The District Court, which had all the facts in the case (something we do not), saw fit to stay the adjudication of the more serious Count 1 and eventually dismiss it altogether. The Order of the District Court expressly orders that “...the Defendant shall not be deemed to have been convicted, and he/she *shall not incur any of the disqualifications or disabilities imposed by law for conviction of crime...*”¹⁷ Likewise, Count 2 was reduced to a misdemeanor, probation fully discharged and the Respondent was “...restored to all civil rights...the same as if said conviction had not taken place...”¹⁸ The District Court Order applies to the Department and to this ALJ. This ALJ has neither the jurisdiction, the constitutional power, nor the desire to contest a valid Order of a District Court.

In addition, conviction of a crime is not per se a bar to obtaining a license. The relevant statute focuses on “an act or practice”.¹⁹ An assessment of an applicant’s suitability for a license must focus on the applicant’s conduct, not exclusively on the fact of a conviction.

This leaves the question of whether the conduct underlying the conviction is a basis to deny the application on grounds of untrustworthiness. The Department argues that because the Respondent abused the trust between an adult and a minor to whom he was giving a ride home, and because he had illegal sexual intercourse with that minor, he is a threat to potential clients with whom he might meet and to any homeowner whose house has a lock-box listed with the multiple listing service.

Respondent argues that the act was a one-time lapse that was neither preceded nor followed by any criminal activity of any kind. There has never been a pattern of misconduct of any kind. He has held a steady, responsible job as a driver for a [DATA REDACTED]. He has successfully completed a sex offender treatment plan. He has a reputation in his community for trustworthiness as evidenced by several witnesses who testified as to their own estimation of his character and their perception of the community’s view of his character. His election by his peers to positions of responsibility and trust in two organizations also demonstrates a current trustworthiness.

The statute that gives the Commissioner the right to deny a license states that he may do so if he finds that “the person has engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or authorized, which demonstrates that the applicant or licensee is untrustworthy...”²⁰ The use of the present tense in the last verb of the provision, (“is”) indicates that the Commissioner should assess the applicant’s trustworthiness at the present time. If the legislature wanted one past act to

¹⁷ Ex. E, emphasis added.

¹⁸ Ex. F.

¹⁹ Minn. Stat. § 45.027, subd. 7(a)(4).

²⁰ Minn. Stat. § 45.027, subd. 7(a)(4).

forever bar a finding of trustworthiness, it could have chosen the words “has been” instead of “is”. The relevant question is whether an applicant is now trustworthy.

The act Respondent committed was cause for concern as to trustworthiness at the time and perhaps for some time thereafter. It is evidence untrustworthiness but it does not create an irrebuttable presumption of untrustworthiness. Trustworthiness is an issue of fact. The preponderance of the evidence at hearing was that the Respondent is currently one who may be trusted with the responsibilities of a real estate sales person license.

For the Department to argue that one isolated act, thirteen years ago, inexcusable though it may have been, should forever mean that a person is untrustworthy, despite all current evidence to the contrary is too harsh. The purpose of the license authority of the Commissioner is to protect the public. This is an important objective that the Commissioner rightly pursues aggressively. At some point, however, that role must be balanced by the policy of the state that persons convicted of crimes should be able to redeem themselves, reenter society, and once again earn the trust of society.

In this case, there is no evidence in the record tending to establish that Respondent is currently untrustworthy. The only conduct for which the Department would deny the application is, at best, tangentially related to the real estate business and is thirteen years old.²¹ Respondent has met the burden of proof that he is currently worthy of the trust necessary for a license. The Department has provided no evidence of recent untrustworthiness to rebut the evidence of Respondent.

Chap. 364 Analysis

Because Respondent has met the burden of proof with regard to the criteria for licensure in Minn. Stat. §45.027, subd. 7, there is no need to rely on the rehabilitation provisions of Chap. 364. Consequently, the question of whether Chap. 364 applies in this case does not need to be addressed.

Motion In Liminie

Respondent tendered a polygraph report with the ALJ as a proposed exhibit. The Department filed a Motion in Liminie opposing the admission of the polygraph report into evidence. At the hearing, the Department argued that polygraphs are not admissible evidence in Minnesota and, therefore, this report should be excluded. The motion was denied and the report was admitted.

²¹ See also, *In Matter of Real Estate License of S.A.R.*, OAH Docket No. 11-1005-16658-2 (2005); *In Matter of Real Estate License of H.T.N.*, OAH Docket No. 3-1005-16895-2 (2005); and *In Matter of Insurance Producer's License of B.I.M.*, OAH Docket No. 11-1004-17015-2 (2006)

Minn. R. pt. 1400.7300, subp.1 states "The judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which prudent persons are accustomed to rely in the conduct of their serious affairs." It was shown at the hearing that the Department of Corrections gave some weight to this polygraph report. In view of that, this ALJ allowed the report into evidence. The objections to the report are such that they go to the weight to be given to the evidence rather than to the admissibility of the report per se.

In reviewing the report, this ALJ did not find the report to have weight or bearing on the case. Assuming the report is accurate and the sexual conduct was consensual, or at least the Respondent believed it to be consensual, it was still illegal. A minor of 15 years of age has no competence, as a matter of law, to consent. As such the report has no bearing on the case.

Summary

The only basis for denial of the Respondent's application is that a criminal act, committed 13 years ago, renders him perpetually untrustworthy. The Respondent has provided evidence that he is, and has been at all times other than in that one instance, a trustworthy person. The Respondent has met his burden of proof in this regard and the Department has provided no evidence to rebut this. For this reason, the ALJ recommends that the Department's denial be reversed.

R.R.K.